

MAR 7 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-1374**

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW
YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Petitioners,

v.

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L.
FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN
W. MCGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM
MILLER,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

JOHN W. CASTLES 3D
STEPHEN J. CRIMMINS
LORD, DAY & LORD
25 Broadway
New York, New York 10004
(212) 344-8480

Attorneys for Petitioners

RALPH K. WINTER
ROBERT H. BORK
BENJAMIN W. COTTEN
JAMES D. HUTCHINSON
DAVID M. IFSHIN
DONALD IVERS

Of Counsel

MARCH 7, 1980

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**PETITION FOR WRIT OF CERTIORARI BEFORE
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APPEALS FOR THE SECOND CIRCUIT**

The Republican National Committee, The Ripon Society of New York, Inc., Paul C. Cardamone, and John A. Schmid respectfully petition that a writ of certiorari before judgment issue, pursuant to 28 U.S.C. §1254(1), to review the final judgment of the United States District Court for the Southern District of New York, presently on appeal to the United States Court of Appeals for the Second Circuit, which was entered on February 19, 1980 by the Hon. Lee P. Gagliardi, U.S.D.J., sitting as a Single-Judge District Court pursuant to 28 U.S.C. §1331. This judgment (which is printed at Appendix A) upheld the constitutionality of certain provisions of the Presidential Election Campaign

Fund Act, 26 U.S.C. §9001 *et seq.* (hereinafter the "Fund Act").

The judgment of the Single-Judge District Court is one of three decisions involving identical issues and parties which upheld certain provisions of the Fund Act as well as the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendment of 1974, 1976 and 1979, 2 U.S.C. §431 *et seq.* Those provisions compel presidential candidates to comply with limits upon campaign expenditures in order to receive general election campaign funding and forbid individual citizens from engaging in a wide variety of political activities requiring personal expenditures in connection with presidential campaigns. The other decisions were by a Three-Judge District Court for the Southern District of New York and by the Court of Appeals for the Second Circuit, *en banc*. A separate Jurisdictional Statement under 26 U.S.C. §9011(b) has been filed this date so as to appeal from the judgment of the Three-Judge Court (hereinafter the "Section 9011(b) Jurisdictional Statement"). A separate Jurisdictional Statement has also been filed this date so as to appeal from the judgment of the Court of Appeals, *en banc*.*

In order to avoid undue repetition in this petition, portions of the Section 9011(b) Jurisdictional Statement will be incorporated by reference in their entirety into this petition.

Opinions Below

The opinions below consist of Joint Findings of Fact (issued jointly by the Single-Judge District Court and the

*The jurisdictional provisions which have caused several judgments to be entered are discussed in the portion of the Section 9011(b) Jurisdictional Statement entitled "Description of Proceedings."

Three-Judge Court) and an Opinion of the Three-Judge Court (which the Single-Judge District Court concurred in and adopted). The single Judge, Hon. Lee P. Gagliardi, U.S.D.J., sat as a member of the Three-Judge Court and issued no separate opinion. The Joint Findings of Fact and the opinion of the Three-Judge Court which have not yet been reported, are printed, respectively, as Appendix B and Appendix C to the Section 9011(b) Jurisdictional Statement.

Jurisdiction

The final judgment of the Single-Judge District Court was entered on February 19, 1980. This suit is brought under 28 U.S.C. §1331. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1). This petition for certiorari before judgment is being filed within 90 days from the entry of the judgment of the Single-Judge District Court.

Questions Presented

(1) Do the campaign expenditure limitations imposed by the FECA on presidential candidates who accept public campaign funding under the Fund Act violate these candidates' rights under the First, Fifth and Ninth Amendments to the Constitution?

(2) Do the prohibitions imposed by the FECA on personal expenditures or contributions by individual citizens in support of publicly-funded campaigns violate these individuals' rights under the First, Fifth and Ninth Amendments to the Constitution?

Statement of the Case

Statutory Framework. The statutes involved are fully discussed in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety.

Description of Proceedings. A procedural history of this case is set forth in detail in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety.

Ruling Below and Appeal. The decision of the Three-Judge Court is summarized in the Section 9011(b) Jurisdictional Statement, which is hereby incorporated by reference in its entirety. The decision of the Three-Judge Court was filed on February 5, 1980, and judgment was entered thereon on February 13, 1980. The Single-Judge District Court entered its judgment on February 19, 1980, concurring in and adopting the decision of the Three-Judge Court.

Petitioners filed a notice of appeal from the judgment of the Single-Judge District Court to take the appeal to the United States Court of Appeals for the Second Circuit. The notice of appeal is printed at Appendix B.

Reasons for Granting the Writ

The Single-Judge District Court and the Three-Judge Court entered identical judgments in the same case upholding the constitutionality of certain provisions of the Fund Act. A direct appeal from the judgment of the Three-Judge Court to the Supreme Court is mandated by statute, 26 U.S.C. §9011(b), and has already been taken. Both judgments should be reviewed together. It will serve no purpose to have the judgment of the Single-Judge District Court reviewed separately by the United States Court of Appeals

for the Second Circuit, which presently has before it the appeal from said judgment, since said Court of Appeals, *en banc*, sitting pursuant to 2 U.S.C. §437h, upheld the constitutionality of the interrelated provisions of the FECA "substantially the reasons set forth in the opinion of the Three-Judge court***." Appendix E to the Section 9011(b) Jurisdictional Statement. That decision is presently on appeal before this Court. Further, in case of any uncertainty concerning the jurisdiction of the Three-Judge Court under the restrictive "implement to construe" language of 26 U.S.C. §9011(b) to decide questions of the constitutionality of the Fund Act, granting this writ will insure that all questions raised by this action will be properly before this Court for ultimate resolution on the merits.

In addition, the portion of the Section 9011(b) Jurisdictional Statement entitled "The Questions Are Substantial", is hereby incorporated by reference, in its entirety.

CONCLUSION

Based upon the foregoing, this petition for a writ of certiorari before judgment should be granted. Alternatively, action on the petition should be deferred pending disposition of the appeal from the decision of the Three-Judge Court.

Respectfully submitted,

JOHN W. CASTLES, 3d
STEPHEN J. CRIMMINS
LORD, DAY & LORD
25 Broadway
New York, New York 10004
Attorneys for Petitioners

RALPH K. WINTER
ROBERT H. BORK
BENJAMIN W. COTTEN
JAMES D. HUTCHINSON
DAVID M. IFSHIN
DONALD IVERS
Of Counsel

Dated: March 7, 1980

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783 (LPG)

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

JUDGMENT OF THE SINGLE-JUDGE COURT

A three-judge District Court having been convened herein by order entered pursuant to 28 U.S.C. § 2284 on November 30, 1978, in accordance with § 801(b) of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9011(b); and defendants having thereafter on February 20, 1979 renewed their motion to dismiss this action; and the three-judge District Court, together with the single-judge District Court, on October 15, 1979, after hearing the parties and accepting submissions of evidence, having filed Joint Findings of Fact; and the parties thereafter having submitted briefs on the renewed dismissal motion; and the three-judge District Court having issued an opinion, dated February 5, 1980, concluding that the complaint must be dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*; and

Appendix A

the single-judge District Court having participated in the deliberations and joined in said opinion of the three-judge District Court; it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' said renewed motion to dismiss this action is granted and the complaint herein is dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*

Dated: New York, New York
February 14, 1980

/s/ LEE P. GAGLIARDI
Lee P. Gagliardi, U.S.D.J.

JUDGMENT ENTERED 2/19/80

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX B**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783 (LPG)

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF
NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L.
FRIEDERSDORF, JOAN D. AIKINS, THOMAS E. HARRIS, JOHN
W. MCGARRY, FRANK P. REICHE, EDMUND L. HENSHAW,
JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and
G. WILLIAM MILLER,

Defendants.

NOTICE OF APPEAL TO THE COURT OF APPEALS

Notice is hereby given that Republican National Committee, The Ripon Society of New York, Inc., Paul C. Cardamone and John A. Schmid, the plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final order and judgment

Appendix B

of the single-judge district court dismissing the complaint
entered in this action on February 19, 1980.

Dated: February 19, 1980

LORD, DAY & LORD

By: /s/ JOHN W. CASTLES 3d

John W. Castles 3d

A Member of the Firm

Attorneys for Plaintiffs

25 Broadway

New York, NY 10004

(212) 344-8480

MAR 24 1980

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Petitioners,

v.

FEDERAL ELECTION COMMISSION, et al.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the
United States Court of Appeals for the Second Circuit

**BRIEF FOR RESPONDENT FEDERAL ELECTION
COMMISSION IN OPPOSITION**

CHARLES N. STEELE
General Counsel

CAROLYN U. OLIPHANT
Attorney

Attorneys for
FEDERAL ELECTION COMMISSION,
ROBERT O. TIERNAN, MAX L.
FRIEDERSDORF, JOAN D. AIKENS,
THOMAS E. HARRIS, JOHN W.
MCGARRY, FRANK P. REICHE,
EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4175

March 24, 1980

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<i>Ewing v. Mytinger & Casselberry</i> , 339 U.S. 594 (1950)	5
<i>Grutka v. Barbour</i> , 549 F.2d 5 (7th Cir. 1977)	5
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On Petition for Writ of Certiorari Before Judgment to the
 United States Court of Appeals for the Second Circuit

**BRIEF FOR RESPONDENT FEDERAL ELECTION
 COMMISSION IN OPPOSITION**

Respondent Federal Election Commission requests that the petition for writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit by petitioners, Republican National Committee, Ripon Society of New York, Inc., Paul Cardamone and John Schmid, be denied.

OPINIONS BELOW

The opinions below, joint findings of fact of the three-judge court and the single judge and the opinion of the three-judge court, are set forth in appellants' appendix to the jurisdictional statement in No. 79-1373. The final judgment of the single judge is set forth in appellants' appendix to the jurisdictional statement in No. 79-1374. These opinions are not yet reported. The single judge did not issue an opinion separate from that of the three-judge court in No. 79-1373. The opinion of the district court convening the three-judge court is reported at 461 F.Supp. 570.

JURISDICTION

28 U.S.C. § 1331 jurisdiction is improper in cases challenging the constitutionality of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.*, or of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* Those statutes have exclusive statutory provisions for judicial review, 2 U.S.C. § 437h and 26 U.S.C. § 9011, respectively.

STATUTES INVOLVED

This appeal challenges provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*, (hereafter the "Fund Act") and also involves certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* (hereafter "FECA"). The full text of both statutes is set forth in appellants' appendix to the jurisdictional statement in No. 79-1373.

QUESTIONS PRESENTED

Whether the specific judicial review provisions of the Presidential Election Campaign Fund Act, 26

U.S.C. § 9011, and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 437h, are the sole bases for federal court jurisdiction to hear cases challenging the constitutionality of the respective statutes.

Whether this Court should uphold the decision of the single judge, rendered after full consideration of the issues, that appellants' complaint does not state any claim based on the unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*

Whether this Court should hear further argument where the questions presented by appellants were decided by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

STATEMENT OF THE CASE

This case and Nos. 79-1373 and 79-1375 arose from a single complaint which was dismissed by three unanimous courts. In order to avoid unnecessary duplication of argument, the complete statement of the case and the reasons why the decisions of the courts below should be affirmed are set forth fully in the Commission's motion to affirm in No. 79-1373 only. Additional jurisdictional questions as to this case and No. 79-1375 are addressed separately in the Commission's motion to dismiss or in the alternative to affirm in No. 79-1375 and in this brief in opposition to petition for writ of certiorari in No. 79-1374. The single district judge in this case was a member of the three-judge court convened pursuant to 26 U.S.C. § 9011(b) in No. 79-1373.

On October 12, 1979, the single district judge and the three-judge court issued joint findings of fact, and the single judge certified to the court of appeals a

question as to the constitutionality of 2 U.S.C. § 441a (b)(1)(B).¹ On February 5, 1980, the three-judge court issued its opinion, App. at 44a-63a, dismissing the complaint insofar as it sought to challenge the constitutionality of the Fund Act. The three-judge court's final judgment was entered on February 13, 1980. Upon request of appellants, the single judge entered a separate judgment also dismissing the complaint insofar as it sought to challenge the constitutionality of the Fund Act. App. in No. 79-1374 at 1a-2a.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court should deny the writ for the reason that 28 U.S.C. § 1331 does not provide jurisdiction to hear claims alleging the unconstitutionality of the Fund Act or of FECA,² and even if jurisdiction was proper

¹ Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth or Ninth Amendment to the Constitution—

(a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;

(b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidates' campaign) to that campaign;

(c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;

(d) by being overbroad?

² Appellants assert that the single judge judgment under 28 U.S.C. § 1331 is necessary in the event that jurisdiction was improper under 26 U.S.C. § 9011(b). In support of this contention, they cite to *Buckley v. Valeo*, Juris. Statement in No. 79-1373 at 5 n.1. However, the concern in *Buckley* was not the abolition of the Three-Judge Court Act, but rather that there was a challenge to

under section 1331, the writ should be denied for the reasons set forth in the Commission's motion to affirm in No. 79-1373.

1. The district court had no jurisdiction over appellants' claims pursuant to its general jurisdiction over federal claims. 28 U.S.C. § 1331. Where Congress has provided specific judicial review mechanisms, jurisdiction is improper under 28 U.S.C. §§ 1331, 2201 or 2202. Special statutory schemes, as provided in FECA and the Fund Act, are held to be the exclusive avenues for judicial review and preclude consideration of such claims pursuant to the general jurisdictional statutes of Title 28. *See Brown v. General Services Administration*, 425 U.S. 820, 834 (1976); *American Power & Light Co. v. SEC*, 325 U.S. 385, 389 (1945). *See also, Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *United States v. Babcock*, 350 U.S. 328 (1919). Accordingly, declaratory and injunctive relief is inappropriate unless pursuant to the specific statutory scheme established by Congress. *See Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir. 1977); *Atlantic & Gulf Stevedores Inc. v. Donovan*, 274 F.2d 794, 798 n.11 (5th Cir. 1960).³

the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031, *et seq.*, Chapter 96 of Subtitle H (as well as to the Fund Act and FECA), and Chapter 96 has no similar extraordinary provision for judicial review. *See* 26 U.S.C. §§ 9040, 9041.

³ Appellants seemingly asserted the declaratory judgment provisions as an independent jurisdictional base. However, this Court has specifically held:

"[T]he operation of the Declaratory Judgment Act is procedural only . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction . . .".

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

The statute central to appellants' claim contains the specific three-judge review provision set forth in 26 U.S.C. § 9011 for resolution of constitutional attacks, as well as provision for regular challenges in the courts to Commission actions; 2 U.S.C. § 437h provides the totally different review scheme of certification to the court of appeals *en banc* of questions relating to the constitutionality of FECA. The conclusion that such challenges as are at issue in this action are properly brought under the general jurisdictional statutes of Title 28, would render section 9011 of Title 26 and section 437h of Title 2 nullities.⁴

2. If this Court determines that jurisdiction was proper under 28 U.S.C. § 1331, it should deny the writ

⁴ Section 437h, originally section 313 of FECA, became section 310 in a renumbering of sections by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). These two judicial review provisions, 2 U.S.C. § 437h and 26 U.S.C. § 9011, are merely one aspect of a comprehensive judicial review scheme devised by Congress to govern FECA and Subtitle H. In addition to these provisions, the 1976 amendments revised the Commission's enforcement procedures, 2 U.S.C. § 437g, to include a specific mechanism for judicial review of Commission action or failure to act. 2 U.S.C. § 437(g)(a)(9), now 2 U.S.C. § 437g(a)(8). The 1979 Amendments to FECA, Pub. L. No. 96-187 (1980), made further revisions to the Commission's enforcement procedures—not herein relevant—and renumbered section 437g. Section 437g(a)(10) provides that all actions brought under § 437g (including actions brought by the Commission to enforce the provisions of both FECA and Subtitle H which may give rise to defenses challenging their constitutionality) shall be advanced on the docket of the court in which filed. Similarly, the Fund Act, Chapter 95, provides for expedited hearing and determination of every case brought pursuant to the provisions of that chapter. 26 U.S.C. § 9010. Chapter 96 of Subtitle H—the Presidential Primary Matching Payment Account—has separate provisions for judicial review. See 26 U.S.C. §§ 9040, 9041.

for the reasons set forth in the Commission's motion to affirm in No. 79-1373.⁵

CONCLUSION

The petition for writ of certiorari should be denied for the foregoing reasons, or for the reasons set forth in the Commission's motion to affirm in No. 79-1373.

Respectfully submitted,

CHARLES N. STEELE
General Counsel

CAROLYN U. OLIPHANT
Attorney

Attorneys for
FEDERAL ELECTION COMMISSION,
ROBERT O. TIERNAN, MAX L.
FRIEDERSDORF, JOAN D. AIKENS,
THOMAS E. HARRIS, JOHN W.
MCGARRY, FRANK P. REICHE,
EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4175

⁵ If this Court determines, however, that jurisdiction was proper under 28 U.S.C. § 1331, the Commission would consider this case appropriate for a prejudgment writ under Sup. Ct. R. 20, because it is the same case as Nos. 79-1373 and 79-1375. The writ should, nevertheless, be denied for the reasons set forth in the Argument in No. 79-1373.

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